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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 868

UNITED TRANSPORTS, INC., CLARK TRANSPORT COMPANY and AUTO CONVOY CO.,

Appellants,

v.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, COMMERCIAL CARRIERS, INC., and KENOSHA AUTO TRANSPORT CORPORATION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

MOTION TO AFFIRM, BRIEF IN SUPPORT, AND CERTIFICATE OF SERVICE FILED ON BEHALF OF INTERVENING APPELLEE, COMMERCIAL CARRIERS, INC.

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MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1 (c) of the Revised Rules of this Court, Commercial Carriers, Inc. moves that the judgment of the United States District Court for the Western District of Oklahoma be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

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BRIEF IN SUPPORT OF MOTION TO AFFIRM

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BRIEF IN SUPPORT OF MOTION TO AFFIRM

Intervening Appellee, Commercial Carriers, Inc., files this its Brief in Support of its Motion to Affirm the Judgment of the United States District Court, Western District of Oklahoma, review of which is sought in the proceeding above captioned, and in support thereof respectfully shows:

I. DECISION FOR REVIEW

The judgments of the United States District Court, Western District of Oklahoma, entered on September 9, 1965, in two causes consolidated by orders of that Court on October 5, 1965, in which judgments the Court declared valid orders of the Interstate Commerce Commission issued in its Docket No. MC 43038 (Sub No. 404), Commercial Carriers, Inc. — Petition for Modification of Existing Certificates, and its Docket No. MC 30837 (Sub No. 185), Kenosha Auto Transports, Inc. Petition for Modification of Existing Certificates, and here sought to be reviewed by Appellants, are appended to Appellants' Jurisdictional Statement identified as A-1 and A-2. Intervening Appellee will direct itself to the judgment involving its particular interests, namely Commercial Carriers, Inc., such judgment being set forth as Appendix A-1 in Appellants' Jurisdictional Statement.

II. APPELLATE JURISDICTION

The jurisdiction of this Court to review such judgment is acknowledged by this Intervening Appellee.

III. INVOLVED STATUTES

The Federal statutes involved are:

1. The Interstate Commerce Act, 49 U.S.C.A. 301 (307).
2. The Administrative Procedure Act, 5 U.S.C.A. 1001.

IV. QUESTIONS PRESENTED FOR REVIEW

1. Whether the questions on which the decision of this cause depends, such questions being outlined on page 5 of the Appellants' Jurisdictional Statement, are so unsub-

stantial as not to need further argument considering the prior decisions of this Court in *The Motor Convoy, Inc. v. United States,* 235 F. Supp. 250, affirmed *per curiam* 381 U. S. 436 and *Convoy Company v. United States,* U.S.D.C., Ore., Civil No. 65-241, affirmed *per curiam* — U. S. —, entered January 17, 1966. This Intervening Appellee says: "Yes!"

2. Whether the judgment of the United States District Court, Western District of Oklahoma refusing to set aside an order of the Interstate Commerce Commission in Docket No. MC 43038 (Sub 404) was reversible error. This Intervening Appellee says: "No!"

V. STATEMENT OF THE CASE

The judgment of the United States District Court, Western District of Oklahoma, entered on September 9, 1965, dismissed a complaint brought to set aside orders of the Interstate Commerce Commission entered in its Docket No. MC 43038 (Sub 404), Commercial Carriers, Inc., Petition for Modification of Existing Certificate. The Commission's orders granted the petition of Intervening Appellee for modification of its present common carrier certificate to authorize the inclusion of secondary movements of new automobiles in truckaway service from Irving and Floydada, Texas to points in Texas, but restricted "to traffic originating at the site of the Cadillac Motor Car Division of General Motors Corporation at Detroit, Michigan and having an immediately prior movement by rail".

The District Court in sustaining the Commission's orders, indicated that in *Motor Convoy, Inc. v. United States, supra*, the Supreme Court had sanctioned the procedure by which the Commission could authorize the modification of "initial movements" of former traffic shipped part way by rail from the factory site, such procedure being in accord with *National Automobile Transporters Association —Declaratory Order*, 91 M.C.C. 395 (hereafter referred to as *NATA*).

VI. ARGUMENT

The Motor Convoy and Convoy Company Cases Are Determinative of the Issues Raised By the Appellants

1. THE MOTOR CONVOY CASE

The questions presented for review in the instant proceeding have all been considered by the Court in *The Motor Convoy, Inc. v. United States, supra,* wherein under facts almost identical to those in the instant proceeding, this Court gave its approval to the procedure for modification of certificates set down by the Interstate Commerce Commission in *National Automobile Transporters Association —Declaratory Order, supra.* In order to define the determinative effects of the *Motor Convoy* case, a brief discussion of the *NATA* decision would perhaps be helpful.

As a result of a petition filed with the Commission on June 27, 1960, by National Automobile Transporters Association, the Commission established certain procedures to be followed by motor carriers of new automobiles seeking modification of their then held operating authorities in order to enable them to co-ordinate their services with rail carriers in trailer-on-flatcar or multi-level car service. Upon receipt of the petition, the Commission gave it Docket No. MC-C-3024, gave public notice of the filing of the petition, received pleadings and briefs from interested parties, held a hearing for the receipt of testimony and documentary evidence,[1] issued a tentative report, accepted further responsive pleadings, and ultimately is-

1. In that proceeding, the president of United Transports, Inc. appeared in support of the petition as president of the NATA and also as president of United Transports, Inc.

sued its Report and Order in MC-C-3024 entitled "*National Automobile Transporters Association—Declaratory Order*" on October 15, 1962, reported in 91 M.C.C. 395. Judicial review of the latter decision has never been sought by any party, including United Transports, Inc., Appellant herein.

In the *NATA* case, the Commission found that motor carriers of automobile traffic holding "initial" authority could not transport such traffic from a rail terminus without modification of such operating authority within the meaning of those terms as defined in *Administrative Ruling No. 75*, promulgated by the Commission's Bureau of Motor Carriers in 1938 and thereafter followed by the Commission in numerous decisions. The Commission further found that without such modification, many carriers were faced with a loss of the traffic which they were then enjoying by reason of the intervention of rail TOFC and MLRC[2], that this would have disastrous economic effects, and that it was in the public interest and the National Transportation Policy to permit modification of such certificates in those instances where a carrier could show by petition to the Commission that it had been engaged in the movement of traffic, that it had lost the traffic because of rail intervention and that the traffic was still available for movement by the applicant in the event of such modification.

The procedure which led to the eventual modification of the Intervening Appellee's authority was in exact conformity with the dictates of the *NATA* case. The *Motor Convoy* case arose in precisely the same context and the Commission there granted the applicant's petition for a

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2. Trailer-on-Flatcar service ("TOFC") and multi-level rail car service ("MLRC").

modification of its certificate in order to permit it to continue to perform the remaining motor portion of its former automobile traffic which it had lost as a result of the shift to MLRC service. The Commission's denial of a request for oral hearing and its grant of the requested modification were sustained by the District Court against essentially the same arguments raised by Appellants herein, and that decision was subsequently affirmed by this Court.

Appellants contend that the limited modification authorized by the Commission is equivalent and should be treated as an application for new authority, thus requiring proof of public need and necessity. The District Court in *Motor Convoy, Inc. et al. v. U. S. et al.*, 235 F. Supp. 250 at 253, met an identical argument squarely and stated: "The need for transportation by [petitioner] had previously been established and [petitioner] had already been supplying that need, and continued to supply that need just as before with the exception of the substitution of rail carriage in lieu of motor carriage for part of the way." The District Court further found that where the existing carriers such as Appellants herein are concerned, they "would not be affected by the situation" (ibid), since no new service in competition with such carriers is authorized by the modification.

The Appellants indicate that the definitions of "initial" and "secondary" movements historically illustrate that these are two separate and distinct authorities. It is precisely with regard to the problems caused by the phraseology employed in *Administrative Ruling No. 75*, the distinct delineation between "initial" and "secondary" authority and the eventual loss of revenues by "initial" authority carriers as a result of the shift to MLRC service that the Commission issued its order in *NATA*. As noted above, *Motor Convoy*, by sanctioning the *NATA* proce-

dure, explicitly forecloses the contention that the modification is a grant of new authority. It is upon this erroneous contention that Appellants base their argument that the dictates of the Administrative Procedure Act with regard to the granting of a hearing and making of adequate findings have not been met. This contention is untenable in that *Motor Convoy* has conclusively established that the *NATA* procedures are valid.

The District Court in its opinion dismissing the complaint of the Appellant, United Transports, Inc., disposed of the procedural issues as follows:

> "It is clear, therefore, that the procedure followed by the Commission in authorizing the modification of the 'initial movements' certificate of Commercial Carriers, Inc. to include 'secondary movements' of its former traffic shipped part by rail from the factory site, has the sanction of the United States Supreme Court and is not open to question here. To the extent that plaintiffs rest their complaint on the failure of the Commission to afford an oral hearing and to find public necessity for additional service, it is without merit." *United Transports, Inc. v. United States*, 245 F. Supp. 561, 565.

The District Court went on to indicate that if United Transports, Inc. (Plaintiff therein and Appellant herein) were to prevail, it must be because the facts before the Commission did not warrant the action taken or because relevant testimony should have been considered but was not. The opinion noted that the Commission had indeed considered all the evidence of record and that there was no showing by United Transports, Inc., in its demand for oral hearing, what it proposed to develop thereby in the way of relevant testimony. The District Court specifically found that Appellant's (United Transports, Inc.) sec-

ondary authority and any financial hardship imposed on it by the granting of the modification were not determinative facts. *United Transports, Inc. v. United States, supra,* p. 565.

In their Jurisdictional Statement, the Appellants emphasize the "monumental gravity of simple requirements of the law governing procedure" (J. S. 10), and urge this Court to define the "procedure which the Commission may use and adopt in such matters in conformity with the statutory requirements of the Administrative Procedure Act and the constitutional requirement of due process" (J. S. 15). It is submitted that this Court did exactly that in the *Motor Convoy* decision. The instant case certainly does not differ substantially from the *Motor Convoy* case, which the Appellants do acknowledge but fail to adequately distinguish. Invocation of the broad concepts of due process in the Fifth Amendment of the Constitution and violations of the dictates of the Administrative Procedure Act are not distinguishing arguments which would compel a different result herein. If an oral hearing were granted, if the evidence proposed to be entered by the Appellants was indeed received and if the Commission minutely set forth with great detail the basis upon which the Commission reached its decision to modify the Intervening Appellee's certificate, the result would be the same. The Commission, according to *NATA,* would not have even considered Appellant's (United Transports, Inc.) evidence as to its secondary authority and proposed loss of investment. Thus, the Appellants' contention that the District Court in the *Motor Convoy* case did not consider or decide the effect of the Administrative Procedure Act and its provisions regarding oral hearings is totally inappropriate be-

cause an oral hearing would produce no further evidence which would change the basic criteria for modification of certificates in accordance with the NATA procedure.

The fallacy in Appellants' argument lies in its contention that the modification procedure is a grant of new authority. The *Motor Convoy* case specifically found that the modification of certificates was not a grant of new authority. Accordingly, none of the bases which determine the granting of a Certificate of Public Convenience and Necessity are applicable here.

2. THE CONVOY COMPANY CASE

The *Convoy Company* case involved an almost identical set of circumstances. In that case, Commercial Carriers, Inc., Intervening Appellee herein, filed a petition for modification of its present common carrier certificate, No. MC 43038 (Sub 415) in accordance with the procedures set forth in the *NATA* decision. The Commission granted the petition for modification so that Commercial Carriers was authorized to continue to transport Chrysler Corporation traffic it had previously handled in through truckaway service from Detroit, Michigan to points in Oregon, by means of truckaway service, ex-rail, from Portland, Oregon to points in Oregon.

The United States District Court, District of Oregon, dismissed a complaint brought to set aside the orders of the Interstate Commerce Commission, finding that "the orders of the Commission . . . are supported by substantial evidence and are not arbitrary or capricious" (*Convoy Company v. United States*, U.S.D.C., Ore., Civil No. 65-241), and that the decision in *Motor Convoy, supra* "is persuasive" (ibid). On January 17, 1966, this Court affirmed *per curiam* the judgment of the District Court.

It would be unduly repetitious to present in detail the factual circumstances surrounding the *Convoy Company* case. It is sufficient to note that Commercial Carriers filed its petition for modification pursuant to the *NATA* decision in order to enable Commercial to continue to participate in the remaining motor movement of its own former traffic. The facts in *Convoy Company, Motor Convoy* and the instant proceeding are essentially identical. The arguments made by Convoy Company[3] also parallel those proposed by the Appellants herein and can be summarized as follows: (1) that the modification was actually a grant of new authority without proof of public need and necessity, (2) that a hearing should have been held to submit such proof of public need and necessity, (3) that the *NATA* decision was only tentative, and (4) that the Fifth Amendment and The Administrative Procedure Act were violated by the Commission's failure to afford a hearing and to issue complete findings supporting its decision. A comparison of these arguments with those propounded by the Appellants (J. S. p. 5) decidedly shows that the argumentative theory of Appellants is the same as that of Convoy Company in *Convoy Company v. United States, supra*, wherein this Court affirmed a District Court opinion which established that *Motor Convoy* was "persuasive". *Convoy Company v. United States, supra.* The *Convoy Company* case, thus, completely emasculates Appellants' contention that *Motor Convoy* did not consider the effects of the Administrative Procedure Act and the Fifth Amendment of the United States Constitution. The conclusion is that, if the *Motor Convoy* case is not completely determinative of the issues herein, the *Convoy Company* case, taken in conjunction with *Motor Convoy*, most certainly is.

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3. See Jurisdictional Statement filed by Convoy Company in *Convoy Company v. United States and Interstate Commerce Commission*, No. 719, October Term, 1965.

The Commission Acted Within its Discretion in Granting Commercial Carriers' Petition for Modification Without an Oral Hearing

This Court has given recognition to the discretionary power of the Commission to establish procedural criteria by which to determine whether an applicant for operating authority has met the statutory requirements of Part II of the Interstate Commerce Act, Section 207 (a), 49 U.S.C.A. 307 (a). *United States v. Pierce Auto Freight Lines,* 327 U. S. 515 (1946); *Interstate Commerce Commission v. Parker,* 326 U. S. 60 (1945). The requirements for the issuance of a Certificate of Public Convenience and Necessity are vitally different than the grant of the type of modification here in issue, and it is again emphasized that the *petitions* herein were not *applications* for new authority. *Motor Convoy, Inc. v. United States, supra; Convoy Company v. United States, supra.* Nevertheless, the Commission has the discretion to determine the necessary procedures in the administration of all of the provisions of the Act. The Commission's discretionary latitude with regard to procedural criteria in the issuance of Certificates of Public Convenience and Necessity certainly applies to the exercise of such discretion with regard to the modification of certificates. It is not to be concluded that the criteria for modification of certificates be necessarily the same as those for issuance of new certificates. *NATA* decided that in the unique situation involved therein, the procedural criteria would indeed be different and would conform to the factual posture of that case.

Disregarding the compelling effect of *Motor Convoy* and *Convoy Company* and the conclusion that an oral hearing is not necessary, what effect does the Administrative Procedure Act have on the actual failure of the Commis-

sion to hold a hearing? Nothing in the Act requires the Interstate Commerce Commission to hold an oral hearing where, in the judgment of the Commission, all of the evidentiary facts upon which the issues of law can be determined are capable of presentation in the pleadings. *United States v. Storer Broadcasting Co.*, 351 U. S. 192, 205 (1956). As noted by the District Court, there is no factual dispute with regard to the facts the Commission considered; therefore, a hearing would not have produced any further relevant evidence.

Appellants also argue that the Commission failed to state the reasons and basis for its order and failed to make findings of fact in support of its conclusions. By its reference to the *NATA* case and the Commission's determination therein of the remedy which should be afforded the automobile haulers, the Commission made entirely clear the policies upon which its determination of Commercial Carriers' petition for modification would be based. Since the relevant facts as set forth in the verified statement in Commercial Carriers' petition were uncontroverted, the facts upon which the Commission based its final conclusion were unmistakably clear. The findings in the *NATA* decision are, in essence, the "record" upon which the instant proceedings were decided. This Court has found that it is sufficient on judicial review if the findings of the Commission, considered in composite, express in clear and understanding manner the Commission's conclusion. *Alabama Great Southern Railway Co. v. United States*, 340 U. S. 216. The findings of the Commission did precisely that.

Appellants Are Actually Requesting This Court to Directly Reverse its Decision in Motor Convoy Without Distinguishing it, and to Determine Collaterally That the Procedure Set Forth in NATA is Violative of the Administrative Procedure Act (5 U. S. 1001, et seq.) and the Due Process Clause of the Fifth Amendment of the Constitution

United Transports, Inc. appeared as a party in the *NATA* proceedings and entered its support for the petition filed by National Automobile Transporters Association. As indicated, judicial review has never been sought by the Appellant, United Transports, Inc., in that proceeding, nor by any other party. Although the instant litigation is a distinct and different proceeding basically involving the same issues, United Transports is attempting to attack collaterally the procedures it supported in *NATA*. It is submitted that as a party to the *NATA* litigation, it had ample opportunity to institute judicial review of that proceeding were it to deem the results therein unsatisfactory. In the interim, that *NATA* procedure has been sanctioned by this Court. United Transports has effectively waived any objections it may have had or now has to that procedure.

In *United States v. L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33, at pages 36 and 37, this Court stated:

> "We have recognized in more than a few decisions and Congress has recognized in more than a few statutes, that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the Courts . . . Simple fairness to those who are engaged in the tasks of administration, and to the litigants, requires as a general rule that Courts should

not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice."

VII. CONCLUSION

This appeal presents no substantial issues that have not been considered by this Court in the *Motor Convoy* case and the *Convoy Company* case. Plenary consideration is not warranted, and for the reasons indicated, this Intervening Appellee, Commercial Carriers, Inc., respectfully prays that its Motion to Affirm the judgment of the District Court be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Donald W. Smith, attorney for Commercial Carriers, Inc., Intervening Appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, I served copies of the foregoing Motion to Affirm and Brief in Support of Motion upon all parties of record in this proceeding by first class air mail, postage prepaid.

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